Introduction

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Law and Religion in the Roman Republic

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Introduction

Roman law is generally regarded as basically differing from other legal systems in Antiquity in that it reached, at an early stage in its development, a very high level of secularisation. However, as late as the first century B.C., the Romans were regarded (and regarded themselves) as the most religious people in the world.[1] Is this a paradox or is the commonly held view really at variance with the sources? The easy way out is to opt for the paradox and to reduce the relevance of religion for law by stressing the fact that Roman religion had no theology and did not prescribe conduct. It is true that the state religion did not give rise to an ethical system of behaviour as did for instance the Torah. Such a system was provided first by the *mos maiorum* and, from the second century B.C. onwards, by the Hellenistic philosophies that conquered Rome. However, there are reasons to assume that, during the Republic, Roman law was not secularised at all, on the contrary, that its connections with religion were never really severed.

First, it was the pontiffs who developed sacred law as well as civil law; only in the first century B.C., did civil law become the domain of legal experts who were not necessarily pontiffs. Second, it is striking that well into the second century A.D. religious rules about, for instance, death and burial were still as much alive as they had been in the early days of the Republic; legal problems would arise, and so sacred law met civil law. Moreover, recent research has shown that, during the Republic, the major priesthoods and the magistracies were closely connected in matters of government as well as law.

Research into these questions seems to have suffered from one-sidedness: legal historians tend to marginalise religion, whereas scholars of Roman religion tend to narrow down law. An interesting example of the latter category is a fairly recent volume on law and religion in classical and Christian Rome; the contributions written by historians deal with religion and public law, whereas the bulk of Roman law concerns private law.[2] As to the former category: so far, Alan Watson has been the only legal historian to dedicate a monograph to the subject.[3] He explains the important role of the pontiffs in Roman private law in the context of the struggle between the patricians and plebeians. Until 300 B.C., only patricians could be pontiffs. According to Watson, they developed the *ius civile* from the interpretation of the Law of the Twelve Tables. By giving advice to the magistrate who

[1] Cicero, *De haruspicum responsis*, 9.19; De natura deorum, 2.3.8.
[2] *Religion and Law in Classical and Christian Rome*, eds. Clifford Ando and Jörg Rüpke (Stuttgart, 2006).
[3] Alan Watson, *The State, Law and Religion: Pagan Rome* (Athens, Georgia, 1992).

operated the court system they and their successors, the jurists, created an autonomous system of law that was different from anywhere else in the world. It seems that Watson's views on the relationship between law and religion are – indirectly – inspired by Mommsen and the Historical School. However, the idea that Roman law had developed into an autonomous legal system is no longer generally supported. It is time to look at Roman law and religion from both sides.

In December 2008, an expert meeting was held at Tilburg University (the Netherlands) to discuss the relationship between law and religion in the time of the Republic. It was the first time that both scholars of Roman religion and of Roman law came together. Admittedly, historians of Roman religion were more willing and able to participate in this project than the legal historians. Since then, contacts between the various disciplines have become more easy and frequent. The results have been put together in this volume.

Of course, several approaches to the interaction of law and religion are possible. Here, three aspects are prominent, and the book is accordingly divided into three parts. The first part focuses on the shared basis of law and religion as means to deal with the future. In the second part of the book, the relationship between law, religion, and the state is explored, by highlighting the religious basis of the magistracies and the legal duties of the various priests. The third part of the book deals with the interaction between religion and private law, by means of a discussion of subjects ranging from the concept of *noxae deditio* to the building of funerary monuments.

How should we deal with the uncertainties of life? In modern times as well as in early Rome, that question has triggered all sorts of activities by individuals and communities. On a societal level, it may lead to the development of common rules that, if properly kept, would ward off danger. This is what happened at Rome. Leon ter Beek states that, in early Rome, religion permeated all aspects of society including law. At the same time, Roman law was of a secular and casuistic nature, just like the legislation of almost all the peoples in the Ancient Near East. This ambivalence can very well be illustrated by the penalty of *sacer esto*, 'he must be cursed'. These words occur in a religious as well as a secular context. An example of the former is the inscription on the *stele* underneath the famous *lapis niger*. On the basis of a thorough discussion of the extant 16 lines of the inscription, Ter Beek suggests that the *lapis niger* marked a sacred spot, maybe the grave of Romulus or of his foster father Faustulus, and that the inscription warned the people to keep this place clean so as to avoid a bad omen. The penalty of *sacer esto* was also used in a secular context, i.e., in the *leges regiae* and the Laws of the Twelve Tables. The clauses mentioning this penalty all deal with wrongs against other

human beings involving a breach of trust. Ter Beek suggests that such wrongs were regarded as a threat to Roman society that could only be warded off by means of a religious penalty.

Since divine law was, in early Rome, one means by which the future could be controlled, it is but a small step to another way of dealing with the future, *divinatio*. Federico Santangelo studies the connection between law and divination in the later Roman Republic, making ample use of Cicero's *de divinatione* and *de legibus*. The verb *divinare* and, later, the noun *divinatio* were used in different ways, varying from the general (making a divinely inspired guess) to the specific (the speech by a prospective prosecutor before the jury in a criminal trial). According to Santangelo, there may have been some line of contact between divination and *prudentia*. The translation of *prudentia* may be problematical, but it clearly derives from *pro-videre*, seeing before, seeing ahead. In this connection, the adjective *prudens* is also interesting: it could be accompanied by a genitive to refer to a kind of knowledge, for instance *iuris prudens*, 'a legal expert, a jurist', or it could be used as a noun; in legal jargon, the noun *prudens* came to mean 'legal expert'. Santangelo draws a parallel between the *responsa* of the jurists and those of the *haruspices*, the priests who in the second and first centuries B.C. acquired a prominent role in Roman public divination: in both contexts, the *responsa* were used as precedents that laid the basis of a 'jurisprudence', but, most importantly, they both originated in a typically divinatory practise. According to Santangelo, the boundaries between *divinatio* and *prudentia* are more porous than it has often been thought.

The close connection between law and religion had a considerable impact on the functioning of the state, and particularly on the magistrates and the priests. Roman religion was an integral part of the state and there was no incompatibility between holding political and religious offices simultaneously. Religion chiefly focused on keeping man in proper contact with the gods. Since any disturbance of those relations could lead to disasters and diseases, religion was a constituent part of public life. Meetings of the senate or assemblies of the people could not begin without the proper ceremonies and rituals being performed. However, the performance of these rituals was not the monopoly of priests but was often assigned to magistrates. Moreover, the latter were responsible for dedicating new temples and for making vows for the senate. The priests, on the other hand, could be involved in performing public duties of a legal nature, such as determining the calendar, supervising legal proceedings, and declaring war and making peace. Priests, unlike the annual magistrates held office for life.

Michel Humm focuses on the magistrates. He uses the enigmatic *lex curiata* to show how, during the time of the Republic, the Roman magistrates derived their powers from the gods of the city, and particularly from Jupiter. In modern literature, the curiate law has been associated with the concept of *imperium* and, therefore, with the higher magistrates; so far, the nature of this connection has remained controversial. However, according to Humm, the curiate law is not only used for higher magistrates with *imperium*, but for all magistrates elected by one of the electoral assemblies of the *populus*. It served to define the magistrate's field of competence (*potestas* and, for greater magistrates, *imperium*) and, consequently, to confer on him the right to take the auspices. There were several situations in which magistrates had to take the auspices, the first being the moment they came into office: these auspices of investiture were important, because it was only when a magistrate had thus obtained Jupiter's assent that his full power of command (*imperium*) as well as his *iuris dictio* were conferred on him. There were also 'departure auspices' that were to be taken by the higher magistrates on whom the senate or the *populus* had conferred the command of an army: they enabled the magistrate to be directly entrusted with *imperium militiae* and war auspices by Jupiter. Humm concludes that the magistrates did not receive their civil, legal, or military powers from the people that had elected them or from the *lex curiata* that enabled them to go and take the auspices, but from Jupiter himself.

Jörg Rüpke turns to the pontiffs. One of their duties was to supervise the calendar, determining the days on which markets and popular assemblies could be held and legal cases could be heard. Rüpke explains that, around 300 B.C., the Roman calendar changed from a lunar to a solar system. In the Mediterranean world, the calendar used to be determined by observation of the moon. Shifting to a solar calendar was attractive for reasons of agriculture, sailing, and - last but not least - for going to war. However, a solar calendar requires significantly greater observational efforts, an institutionalised memory, and specialists. Because the results are less obvious, it also requires power of enforcement. In Rome, these conditions were fulfilled at the end of the fourth century B.C. The change of the calendar triggered another innovation in that, for the first time, the calendar including all the days of the year was written down and published. Almost every day was categorised as either *Nefas* or *Fas*, indicating which days were market days, assembly days, and/or days to initiate legal proceedings. According to Rüpke, this change also affected the ritual elements of Roman law. Until then, the pontiffs had decided on which *formulae* had to be pronounced to start legal proceedings. Now, the *formulae* were summarized in the form of a table and published. This publication was part of the logic of the calendar reform. Rüpke argues that these innovations

cannot be described as secularization nor as sacralisation but rather as rationalization of religious practices.

It could be expected that the publication of the *dies fasti* and the legal *formulae* would affect the position of the pontiffs in their capacity as supervisors of civil procedure. Indeed, many historians think it did. Jan Hendrik Valgaeren argues that it did not. On the contrary, it may have led to an increase in the number of lawsuits. The fourth century B.C. had seen the expansion of Roman territory and the ensuing growth of the Roman economy. Moreover, the publication was not meant to weaken the pontiffs' position but was part of the logic of the calendar reform as described by Rüpke. The *lex Ogulnia* of 300 B.C., which doubled the number of pontiffs, may have been introduced in order to help the pontiffs cope with the increase in their legal duties.

Of old, the Fetial priests had been charged with declaring war and making peace but they ceased to function after 200 B.C. That, at least, is the commonly held view, and the college is supposed to have been revived only by Augustus in 32 B.C. Linda Zolschann, however, takes a stand against this view. In her contribution, she shows that between 200 and 32 B.C. the Fetial priests continued to perform most of their traditional duties. These duties involved first and foremost the conclusion of treaties (*foedera*). Such treaties were sealed with mutual oaths. Ten treaty inscriptions discovered in the last two centuries furnish evidence that, in the second and first centuries B.C., it was a Fetial priest who swore the oath on behalf of the Roman people. In this period, the Fetials also performed other traditional duties including the annual renewal of treaties, the organisation of annual games for Jupiter Feretrius, and the guarding of Fetial law. The fact that the names of Fetial priests begin to be recorded only in the first half of the first century A.D. does not support the argument that Augustus revived this ancient priestly college, nor does their disappearance around A.D. 240 show that the Fetials ceased to exist. According to Zollschan, it only mirrors the rise and fall of the 'epigraphic habit'. She concludes that the Fetial priesthood continued to function in the middle and late Republic and that we must await further discoveries in order to know when they really died out.

The third part of the book deals with the interaction between religion and civil law. The persons dealing with legal problems between citizens were traditionally the same as the persons dealing with problems between the citizens and their gods. It was not until the first century B.C. that a new phenomenon arose: the legal expert or jurist who was not necessarily involved in one of the priestly colleges. These jurists were not 'professionals'. They belonged to the elite, serving as magistrates and priests, acting as advocates, giving legal advice, and

collecting and publishing their opinions. Some of them were experts in sacred law as well as in civil law. It is these jurists that were responsible for the rationalization of Roman law, at the same time guarding its religious roots.

Sacred law and civil law differ immensely as to our knowledge about them. Roman civil law has been relatively well documented in Justinian's *Digest*, which was compiled in the sixth century, but there is no such collection of sacred law. During the last two centuries, quite a few attempts have been made to reconstruct Roman sacred law. Olga Tellegen-Couperus discusses the most recent one, made by the well known expert in Roman religion, John Scheid. Focusing on pontifical law, Scheid reconstructed two elements of the punishment of a religious offence: the designation of the guilty person and the establishment of guilt. For the first element, he used a concept known from civil law, *noxae deditio*, for the second one he used a *regula* of the jurist and pontiff Q. Mucius Scaevola (cos. 95 B.C.). However, from the point-of-view of Roman law, this way of working does not convince. First, Scheid does not distinguish between the forms of *deditio* in early Roman law, about which next to nothing is known, and the *noxae deditio* of classical Roman law. The latter is well-attested in the sources and has nothing in common with the early *deditio*. Therefore the comparison does not hold and cannot support the reconstruction of the first element. Secondly, Scaevola modified the extant distinction between intentional and unintentional wrongdoing in sacred law in order to relax the rules. In a civil law case, however, he is known to have introduced the same distinction in order to tighten the rules. Therefore, it is clear that, in the second century B.C., sacred law and civil law had become two separate sets of law that, as far as we know now, cannot easily be used to fill up a lack of knowledge on either side. Moreover, the jurists started to publish their *responsa* and so made it possible for a body of civil law to come into being. Unfortunately, this did not happen for sacred law.

Important for understanding how law and religion operated is an appreciation of the sacred in Roman life and society. James Rives sets to work almost like an archaeologist to discover the earlier layers of the trichotomy *sacer-sanctus-religiosus* mentioned by the second century jurist Gaius. These words were used to indicate respectively a temple, a city-wall, and a grave. As *res divini iuris*, they were not susceptible to human ownership. However, it was people who made them into *res divini iuris*: magistrates and priests created *res sacrae* and *sanctae*, whereas *res religiosae* were made by private people. The elite to which magistrates and priests of old belonged controlled the *res sacrae et sanctae*, but not the *res religiosae*. According to Rives, the latter may have even included more than graves. Festus, for instance, declared a place that was struck by a lightning bolt to be immediately

religiosus. Such an event was completely outside any human control. Originally, even the adjective *sacer* may have applied to anything perceived as having some inherent connection with the divine. Rives suggests that the elite through the magistrates and the priests first appropriated what was *sacer* and *sanctus*, and in the time of the Empire also *res religiosae*. They did so by recognizing as such only a few specific cases, and in the end only graves.

Grave monuments were an important means to secure the immortality of the soul. However, after a person's death, it was (and still is) difficult to ensure that his descendants would keep his memory alive, for instance by erecting a monument for him. To this end, people often inserted a *fideicommissum* in their will or codicil with instructions regarding burial or cremation and the monument. Among the living, such a clause would be binding but, in the case of funerary monuments, the interested party was the deceased person who could not ensure that the request was executed. Jan Willem Tellegen discusses three different kinds of sources that deal with this problem: a letter by Pliny the Younger about a case in which the request was not carried out, two inscriptions on monuments which record instances when it was, and three *responsa* on the subject that have been included in Justinian's *Digest*. It seems that, to a certain extent, the jurists were willing to support the attempts of testators to make their heirs build a sepulchral monument for them. However, there was a limit: the first century B.C. jurist Alfenus Varus denied that disinheritance could be used as a punishment for not erecting a monument. The liberty of the heirs to accept or forego the inheritance must never be curtailed. According to Tellegen, it is necessary to combine various kinds of sources in order to understand the paradoxical nature and the importance of the legal problems involved and to appreciate the common sense of the Roman jurists in solving these problems.

In conclusion, I hope that this volume will make clear that the Roman people were remarkable, but not for - at an early stage - secularising their law. In the first centuries of the Republic, religion permeated society. Magistrates received their power from the gods, priests performed secular as well as religious duties, and religious penalties were imposed for both religious and secular wrongs. A large part of this tradition remained intact well into the Empire. Around 300 B.C., when the Roman territory had come to include the whole of central Italy, an important step towards rationalization was taken by the pontiffs introducing the solar calendar. The ensuing publication of the calendar and of the legal *formulae* enabled the Roman citizens to know when there would be market days and when assembly days, and when and how they could start legal proceedings. In the second century B.C., civil law crystallized into a set of rules that differed from sacred law. Legal experts, and these were no longer necessarily pontiffs, began to publish their *responsa*, turning Roman law into a fixed

set of concepts that for the centuries to come could (and would) be applied to a large variety of legal problems. The fact that this did not happen for sacred law does not mean that religion lost most or even some of its relevance to Roman law and society. It does mean that it is less easy to see the lasting connection between Roman law and religion. In my view, this connection can only be fully discerned when legal historians and historians of Roman religion work together more closely. I hope this book may inspire them to do so.